Supreme Court, U.S.
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No. 91-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner Malcolm Pirnie, Inc. ("Malcolm Pirnie") pursuant to Supreme Court Rule 15.6, hereby submits the following reply to respondent's brief in opposition to Malcolm Pirnie's petition for a writ of certiorari, addressing arguments first raised in that brief.

The respondent's brief contains factual errors which materially affect the Department of Labor's ("DOL's") argument as to whether the window of correction would be available in this case. *See* Brief in Opposition, page 11-15. Specifically, the objectionable text states:

> Similarly, a court in the Fourth Circuit could conclude that the deductions affecting only seven non-plaintiff employees in *Hartman* and 26 non-plaintiffs in *Fire Fighters* over almost three years were infrequent enough to qualify as "inadvertent" under 29 C.F.R. 541.118(a)(6), while petitioner's 100 deductions affecting 24 Grade 6 through 9 employees over a 19-month period, along with an unspecified number of additional deductions affecting employees in lower grades were not inadvertent.

Brief in Opposition, page 14, footnote 8. This footnote states that there were over 100 deductions affecting Grade 6 through 9 employees, a statement that is not supported by the record below. The record below states that there were 24 individuals who charged a total of about 100 man hours of absences (*not* 100 separate deductions) to "absent without pay" on time records.[1] The respondent correctly recites this fact on page 5 in its brief in opposition.

Petitioner further objects to the implication that there, in fact, were *more* than 100 deductions affecting exempt employees. The footnote states that the 100 deductions "were only for Grade 6 through 9 employees" and that there were "an unspecified number of additional deductions affecting employees in lower grades." Brief in Opposition, page 14, footnote 8. In fact, the employees in the lower grades were classified as non-exempt employees, and were paid time-and-a-half as required by the Fair Labor Standards Act. Furthermore, these employees were never party to the present litigation; presumably because DOL had no quarrel with Malcolm Pirnie's payroll practices with respect to its non-exempt employees in Grades 1-5.

Lastly, the brief in opposition contains another misstatement. Specifically, it claims:

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[1] It is worth noting that approximately one million man hours were worked in the critical time period.

> In this case, . . . petitioner does not now contend that it acted inadvertently.

Brief in Opposition, page 14. To the contrary, Malcolm Pirnie does maintain that the deductions made were inadvertent, just as the district court held. That very position was briefed and defended before the Second Circuit and there is no statement in the petition for certiorari disclaiming it. The petition for certiorari is premised primarily on that portion of the Second Circuit's opinion which reflects a conflict between the circuits, specifically, that payment in strict accordance with the salary basis test is a condition precedent to utilizing the window of correction. Malcolm Pirnie continues to assert that the deductions made were inadvertent.

CONCLUSION

For the reasons contained in Malcolm Pirnie's Petition for a Writ of Certiorari and Reply to Brief in Opposition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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